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Via Email and Certified Mail, Return Receipt Requested

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Re: Mutilated halibut on board F/V *On the Fly*
Incident Number: 2106039
Appeal of Agency Counsel Determination of a Written Warning

Dear Mr. Krueger,

This determination concerns an appeal you filed on behalf of Respondent John Fields, the owner and operator of the fishing vessel (F/V) *On the Fly*. Respondent is appealing a written warning determination issued by the Chief of the Oceans and Coasts Section within the National Oceanic and Atmospheric Administration (NOAA), Office of the General Counsel (Agency counsel). In that determination, Agency counsel affirmed in part, and vacated in part a written warning documenting that Respondent unlawfully filleted and mutilated Pacific halibut in waters in and off Alaska in violation of the North Pacific Halibut Act, 16 U.S.C. §§ 773e *et seq.*, regulations codified at 50 C.F.R. § 300.66(m), and Annual Management Measure 29(1)(d).¹ On March 21, 2022, Respondent sought administrative review of the Agency counsel determination and requested that the written warning be vacated in its entirety. For the reasons stated below, the request is denied.

I. Background

The facts giving rise to this appeal are not in dispute. Respondent is a Florida resident who held an Alaska Nonresident Annual Sport Fishing License for the 2021 fishing season. On September 1, 2021, during a routine Joint Enforcement Action patrol, a NOAA, National Marine Fisheries Service, Office of Law Enforcement, Alaska Division enforcement officer (EO) observed Respondent's 62-foot Hampton Trawler, named F/V *On the Fly*, anchored in Haus Bay waters located off the coast of Southeast Alaska. Respondent granted the EO permission to board the vessel, informed the EO that five guests were on board, and permitted the EO to examine the contents of a garbage bag filled with approximately ten pounds of filleted Pacific halibut that had been caught, retained, and prepared for freezing.

After examining the contents of the garbage bag, the EO explained that the Pacific halibut did not meet the applicable filleting requirements. Photographic evidence shows the Pacific halibut had been mutilated and cut into more pieces than legally allowed and no patch of skin was naturally attached to each piece, as legally required. Unaware of Respondent's

¹ The Annual Management Measure was published in the *Federal Register* on March 9, 2021. See NOAA, Pacific Halibut Fisheries; Catch Sharing Plan, 86 Fed. Reg. 13,475, 13,489 (Mar. 9, 2021).



previous 2017 violation for a similar offense, the EO did not seize the Pacific halibut. Instead, on September 15, 2021, the EO issued a written warning to Respondent for the violation described above.

Legal counsel for Respondent timely filed an initial request for Agency counsel review of the written warning. On January 20, 2022, Agency counsel affirmed the part of the written warning alleging a violation of the Annual Management Measures, and vacated the portion of the written warning alleging a violation of 50 C.F.R. § 300.66(m). On March 21, 2022, Respondent, by and through legal counsel, appealed to the NOAA Deputy General Counsel seeking review of the Agency counsel determination and requesting the written warning be vacated in its entirety.

II. Procedural Review of the Agency Counsel Determination

Pursuant to 15 C.F.R. § 904.403(b) (2021), a Respondent may file an administrative appeal with the NOAA Deputy General Counsel within 60 days from the date of receipt of an Agency counsel determination affirming a written warning.² On appeal, the NOAA Deputy General Counsel has discretion to affirm, vacate, or modify the written warning, and must notify the Respondent of the determination.³ The NOAA Deputy General Counsel's determination constitutes final agency action for purposes of judicial review.⁴

III. Legal Framework

The North Pacific Halibut Act, 16 U.S.C. §§ 773 *et seq.*, was enacted in 1982 to implement the Convention between the United States and Canada for the preservation of the Halibut Fishery of the Northern Pacific Ocean and Bering Sea, as amended (Convention). The statute applies to halibut inhabiting Convention waters off the west coast of the United States and Canada, as described in Article I of the Convention.⁵ Pursuant to Article I of the Convention, "convention waters" also include waters in the southern and western coasts of Alaska.⁶ The purposes of the Convention are to effectively preserve and manage the halibut fishery of the Northern Pacific Ocean and Bering Sea.⁷ To achieve the Convention's goals, the North Pacific Halibut Act and Convention established the International Pacific Halibut Commission (IPHC).⁸

The IPHC has authority to recommend Northern Pacific halibut regulations, including those regulations to govern commercial and sport halibut fishing, to the U.S. Secretaries of State

² The procedural regulations governing written warning appeals are revised. Beginning on August 1, 2022, review of a written warning appeal will no longer be processed under the tiered appeal review process that was used in this appeal. All future appeals of written warnings will be directed to the NOAA Deputy General Counsel. *See* Civil Procedures in Civil Administrative Enforcement Proceedings, 87 Fed. Reg. 38,934, 38,942 (Jun. 30, 2022). This procedural change does not impact the processing of this appeal or change the determination.

³ 15 C.F.R. § 904.403(c) (2021).

⁴ *Id.*

⁵ 16 U.S.C. §§ 773(a) and (d).

⁶ Convention between the United States of America and Canada for the Preservation of the Halibut Fishery of the Northern Pacific Ocean and Bering Sea, signed at Ottawa, Canada on March 2, 1953 (Convention), 5 UST 5; TIAS 2900; 222 UNTS 77, as amended by the Protocol Amending the Convention, signed at Washington Mar. 29, 1979 (Protocol), 32 UST 2483; TIAS 9855.

⁷ *Id.*

⁸ 16 U.S.C. § 773a; Convention, Art. III.

and Commerce (Secretaries).⁹ If approved by both Secretaries, these regulations (referred to as “Annual Management Measures”) are promulgated by NOAA and published annually in the *Federal Register*.¹⁰ The Secretaries do not have discretion to modify the IPHC’s recommendations.¹¹ Effective February 18, 2021, and as applicable to recreational fishing for Pacific Halibut in Regulatory Area 2C (Southeast Alaska), Annual Management Measure 29(1)(d) stated in pertinent part:

No person shall possess on board a vessel, including charter vessels and pleasure craft used for fishing, Pacific halibut that have been filleted, mutilated, or otherwise disfigured in any manner, except that each Pacific halibut may be cut into no more than 2 ventral pieces, 2 dorsal pieces, and 2 cheek pieces, with a patch of skin on each piece, naturally attached.”¹²

Additionally, NOAA regulations make it unlawful for any person to “[f]ish for halibut except in accordance with the [published] annual management measures”¹³ Violations of the North Pacific Halibut Act (including violations of the Convention or any regulation issued thereunder, such as the IPHC Annual Management Measures) can result in the assessment of a maximum civil penalty of \$264,759 for each violation.¹⁴ *In lieu* of a civil penalty, a written warning may be issued,¹⁵ which may serve as a basis for dealing more severely with a subsequent violation.¹⁶ Moreover, pursuant to the NOAA Civil Penalty Policy, prior violations (including, but not limited to, those that result in a written warning, summary settlement, administrative settlement, final orders and judgments, criminal conviction, or consent decree) that occur within 5 years from the date of the current violation may serve as a basis for an upward adjustment of the penalty.¹⁷

IV. Discussion

Respondent argues the written warning should be vacated in its entirety because: A) the Annual Management Measures are arbitrary, capricious, and contrary to law; and B) fairness and equity demands discretionary vacatur of the written warning based on Respondent’s long history of compliance with the bag limits spanning thirty years. These are the same arguments that Respondent previously raised and that Agency counsel previously considered and rejected during the first appeal. None of these arguments, considered individually or collectively, are persuasive.

A. Annual Management Measure 29(1)(d) is not arbitrary, capricious, or contrary to law.

⁹ 16 U.S.C. § 773c(c); Convention, Art. V.

¹⁰ 16 U.S.C. §§ 773(b), 773a, 773b, and 773c(c).

¹¹ Pursuant to the Halibut Act, the Secretaries may not modify the IPHC’s recommendations but only “accept or reject” the recommendations. Convention, Art. 4; 16 U.S.C. § 773b.

¹² See NOAA, Pacific Halibut Fisheries; Catch Sharing Plan, 86 Fed. Reg. 13,475, 13,489 (Mar. 9, 2021).

¹³ 50 C.F.R. § 300.66(a).

¹⁴ 16 U.S.C. §§ 773e(1)(A) and 773(f)(a); 15 C.F.R. § 6.3(f)(3).

¹⁵ 15 C.F.R. § 904.400.

¹⁶ 15 C.F.R. § 904.401.

¹⁷ See NOAA Office of the General Counsel, Enforcement Section, *Policy for the Assessment of Civil Administrative Penalties and Permit Sanctions*, at 10-11 (Jun. 24, 2019), available at <https://www.gc.noaa.gov/documents/Penalty-Policy-CLEAN-June242019.pdf> (last visited Jul. 13, 2022).

The administrative record and applicable law do not support a finding that Annual Management Measure 29(1)(d) is arbitrary, capricious, or contrary to law. As such, the Agency counsel determination is upheld.

As a threshold matter, the arbitrary and capricious standard set forth in *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2569 (2019), and other cases cited by Respondent applies only to decisions made pursuant to the Administrative Procedure Act (APA), 5 U.S.C. §§ 551 *et seq.* In some contexts, the IPHC's Annual Management Measures have been deemed a foreign affairs function, not subject to the requirements of the APA. *See Jensen v. National Marine Fisheries Service (NOAA)*, 512 F.2d 1189, 1191 (9th Cir. 1975). But even if the APA's standard of review applies, Respondent's arguments that Annual Management Measure 29(1)(d) is arbitrary, capricious, or contrary to law are without merit and are rejected.

Respondent's argument that Annual Management Measure 29(1)(d) contradicts the express language of the Convention is unconvincing. The IPHC Annual Management Measures are "designed to develop the stocks of halibut in the Convention waters to those levels which will permit the maximum sustained yield and to maintain the stocks at those levels."¹⁸ Article I, paragraph 5 of the Protocol further establishes that "sport fishing for halibut and other species by nationals and vessels of each Party may be conducted in Convention waters" in a manner that is subject to and in accordance with the IPHC and other applicable regulations, permits, and licensing requirements.¹⁹ As the Agency counsel determination states, Annual Management Measure 29(1)(d) neither inequitably prohibits multi-day fishermen, who do not return to port each day, from fishing, nor is it inconsistent with the framework established under the Convention.²⁰ Instead, the Annual Management Measure strikes a reasonable balance by allowing sport fishermen to prepare and freeze the halibut without returning to port on a daily basis and allowing law enforcement to independently identify the number of fish retained on a vessel.²¹

Furthermore, the applicable law does not support Respondent's argument that Annual Management Measure 29(1)(d) draws an arbitrary distinction between Pacific halibut caught in Convention waters in and off Alaska (which Respondent says are arbitrarily subject to heightened restrictions) and Pacific halibut caught in other waters like those in and off California, Oregon, Washington, and British Columbia. As the Agency counsel determination holds, different fishing seasons, catch limits, and size limits for different regions or areas can legitimately be established because "[f]ishery regulations are intended to respond to specific regional concerns."²² Annual Management Measure 29(1)(d) was first established in 1997,²³ and

¹⁸ *See supra* note 6.

¹⁹ *Id.*

²⁰ Agency Counsel Determination, at 4.

²¹ *Id.*; NOAA, Pacific Halibut Fisheries; Limited Access for Guided Sport Charter Vessels in Alaska, 75 Fed. Reg. 554, 588 (Jan. 5, 2010); NOAA, Pacific Halibut Fisheries; Catch Sharing Plan, 83 Fed. Reg. 10,390, 10,394 (Mar. 9, 2018).

²² Agency counsel determination, at 5.

²³ Annual Management Measure 29(1)(d), originally enacted as Annual Management Measure 22(6), established blanket restrictions on sport fishing for halibut in all waters of Alaska and made it unlawful for any person to "fillet, mutilate, or otherwise disfigure a halibut in any manner that prevents the determination of minimum size or the

has evolved throughout the years to address concerns raised by sport fishermen and improve enforcement officers' ability to determine whether halibut retained by sport fishermen comply with the applicable catch limits.²⁴ Annual Management Measure 29(1)(d) has also been revisited and evaluated several times and, to date, no action has been taken to relax the Annual Management Measure 29(1)(d) filleting requirement.²⁵

Moreover, the facts do not support Respondent's argument that Annual Management Measure 29(1)(d) is arbitrary, capricious, or contrary to law as applied to Pacific halibut sport fishermen, like Respondent, who have a small number of fishes on board in amounts that do not exceed the daily bag limit. Annual Management Measure 29(1)(b) establishes that the daily bag limit in Convention waters in and off Alaska is two Pacific halibut of any size per day per person unless a more restrictive bag limit applies.²⁶ As Agency counsel observed, the EO report does not specify the exact number of fishes that were retained by Respondent and his guests.²⁷ It merely states that approximately ten pounds of filleted halibut were in a garbage bag.²⁸ An inference that the bag limit was satisfied cannot be drawn by simply dividing the pounds of fish in the garbage bag by the number of fishermen on the vessel. Annual Management Measure 29(1)(b) (bag limit) and 29(1)(d) (filleting requirement) are separate provisions of a cohesive regulatory regime, and each provision must be satisfied. Since the fish were mutilated and cut into several pieces, it was impossible for the EO to determine the exact number of fishes caught, possessed and landed by Respondent and his guests.²⁹ Therefore, Respondent's argument is rejected.

B. The decision whether to vacate a written warning is discretionary.

Finally, Respondent's argument that equity and fairness demand that the written warning be vacated based on his compliance history spanning over 30 years is also without merit. The administrative record shows that Respondent has not had an unblemished 30-year compliance history, as he claims. Respondent's argument that he may have to sell his boat to avoid future, more serious action from NOAA is equally unconvincing. The administrative record shows that Respondent had a violation of the same or similar Annual Management Measure in 2017, which resulted in a \$200 summary settlement. The 2021 violation, which is the subject of this appeal resulted in a written warning, which carries no penalty. To avoid future NOAA action

number of fishes caught, possessed, or landed. *See* NOAA, Pacific Halibut Fisheries; Catch Sharing Plan, 62 Fed. Reg. 12,759, 12,766 (Mar. 18, 1997); *see also id.*

²⁴ *See* NOAA, Pacific Halibut Fisheries; Catch Sharing Plans, 73 Fed. Reg. 12,280, 12,281 (Mar. 7, 2008); *see also* NOAA, Pacific Halibut Fisheries; Guided Sport Charter Vessel Fishery for Halibut, 74 Fed. Reg. 21,194, 21,220 (May 6, 2009); Agency counsel determination, at 4.

²⁵ Respondent claims he submitted a proposal for amending Annual Management Measure 29(1)(d) to the IPHC at the annual meeting in January 2022. Respondent further claims the commissioners expressed an interest in amending the regulations to accommodate sport fishermen, but deferred considering the proposal so that additional discussions could be conducted with enforcement agencies. *See* Respondent's appeal letter dated March 21, 2022, at 5-6; *see also* Agency counsel determination, at 5.

²⁶ NOAA, Pacific Halibut Fisheries; Catch Sharing Plan, 86 Fed. Reg. 13,475, 13,489 (Mar. 9, 2021).

²⁷ Agency counsel determination, at 6.

²⁸ *Id.*

²⁹ *Id.*

Respondent simply needs to comply with the applicable laws and regulations, including the Annual Management Measures.

V. Conclusion

For the reasons set forth above, I hereby affirm the Agency counsel determination, which vacated the portion of the Written Warning issued for a violation of 50 C.F.R. § 300.66(m) and upheld the portion of the Written Warning issued for the September 1, 2021 violation of the North Pacific Halibut Act, 16 U.S.C. § 773e(1)(A), regulations codified at 50 C.F.R. §§ 300.66(a), and Annual Management Measure 29(1)(d).

This determination constitutes final agency action.

Sincerely,

Kristen L. Gustafson

cc: William Ellis, Office of Law Enforcement Assistant Director – Alaska Division